IN THE INDEPENDENT
LEGAL SERVICES COMMISSION

No. 004 of 2015

BETWEEN:

CHIEF REGISTRAR

Applicant

AND:

SAIMONI NACOLAWA

Respondent

Coram: Dr T.V. Hickie, Commissioner

Counsel for the Applicant: Mr. A. Chand
Respondent: In Person

Dates of Hearing: 21st April and 6th June 2016 (Mention)

Date of Judgment: 21st September 2016

RULING ON VALIDITY OF CHARGE AGAINST RESPONDENT

1. The Issue

[1] This is a judgment to clarify:

(1) **Whether the onus upon a legal practitioner to appoint an auditor** to audit the legal practitioner's trust account (as required by section 11(1) of the *Trust Accounts Act 1996*), **extends to the legal practitioner also 'making proper enquiry' that the auditor fulfills section 11(3)(a) of the *Trust Accounts Act 1996,* that is,** that the '***person shall not accept appointment as nor act as auditor … unless that person*** *- (a)* ***is the current holder of a Certificate of Public Practice*** *issued by the Fiji Institute of Accountants"*? In other words, does the requirement upon the auditor (to be '*the current holder of a Certificate of Public Practice issued by the Fiji Institute of Accountants')* extend, **by inference**, to the legal practitioner who so appointed the auditor?

(2) Further, is a legal practitioner liable for a charge of 'professional misconduct' for their failure in not 'making proper enquiry' that the auditor was the 'current holder of a Certificate of Public Practice', even though section 11(3)(a) of the *Trust Accounts Act 1996* specifically refers to the onus on the person **accepting appointment** as an auditor **and makes no mention of any such onus upon the person who so appoints the auditor**?

2. Background

(1) The Count

[2] On 17th September 2015, an Application was filed by the Chief Registrar setting out one allegation of Professional Misconduct against the Respondent as follows:

Count 1

Professional Misconduct: Contrary to Section 82(1)(a) of the *Legal Practitioners Decree 2009*.

PARTICULARS

SAIMONI NACOLAWA, a Legal Practitioner, being the principal of the law firm Nacolawa & Co, while presenting the law firm's Trust Account audit report to the Office of the Attorney General and the Chief Registrar for the period 1st October 2013 to 30th September 2014, without making proper enquiry about Rohit Ravinesh Prasad of Best Business Accounting Services, improperly engaged the services of the said Rohit Ravinesh Prasad to prepare the law firm's Trust Account audit report when Rohit Ravinesh Prasad was not a current holder of a Certificate of Public Practice issued by the Fiji Institute of Accountants as required by section 11(3)(a) of the Trust Accounts Act 1996, which conduct was a contravention of section 82(1)(a) of the Legal Practitioners Decree 2009 and was an act of professional misconduct.

(2) Application for recusal of the previous Commissioner

[3] When the matter was first called on 25th September 2015, before the previous Commissioner, Justice P.K. Madigan, Mr. D.S. Naidu appeared as Counsel for the Respondent. Mr. Naidu noted that as the Commissioner was the presiding judge in a criminal case in the High Court at Lautoka where the Respondent was one of several defendants, Mr. Naidu asked for the Commissioner to recuse himself from hearing the application before the Commission.

[4] Also, on 25th September 2015, according to Justice Madigan's notes, **Mr. Naidu said words to the effect that *"if found guilty that offence of strict liability then could affect our client's position"***. [My emphasis] Presumably, this was some form of query as to the nature of the charge.

[5] At the second mention on 21st October 2015, the argument questioning the nature (and presumably validity) of the charge was further crystalised by Mr. Naidu submitting that section 11(3)(a) of the *Trust Accounts Act 1996* was an

onus placed upon an auditor not upon a legal practitioner. The main issue, however, at that stage was the request for recusal.

[6] Justice Madigan refused to recuse himself noting that the application before the Commission and the criminal proceedings before the High Court were completely separate offences – one as a practitioner, one as a member of the community. He also noted that he had not made any findings of credibility in the criminal matter and would not be called upon to make findings until 2016 at the earliest. An adjournment was then granted until 7th October 2015, that was later amended until 21st October 2015.

[7] On 21st October 2015, Mr. D.S. Naidu again appeared as Counsel for the Respondent submitting that section 11(3)(a) of the *Trust Accounts Act 1996* was in respect of an onus placed upon an auditor not upon a legal practitioner. Counsel for the Applicant responded that the charge was that with due diligence the practitioner should have enquired if the auditor was properly qualified to prepare his audit report. It was also mentioned by Mr. Naidu that the Respondent had filed that day with the Court of Appeal a Summons (together with an Affidavit in Support) returnable on 30th October 2015 seeking:

(1) Leave to Appeal out of time in relation to the Order of the Commissioner refusing the Respondent's application for the Commissioner to recuse himself from further hearing of the professional misconduct charge; and

(2) A stay of the further hearing of the professional misconduct charge pending determination of the Appeal.

[8] It was also noted at the appearance on 21st October 2015, that a Summons and an Affidavit in Support had to be filed with the Commission seeking the above Orders. This was done on 26th October 2015 and made returnable in the Commission on 3rd November 2015.

[9] On 3rd November 2015, Ms. T. Draunidalo of Counsel appeared on behalf of the Respondent and confirmed that:

(1) The Summons for Leave to Appeal had been called in the Court of Appeal on the previous Friday, 30th October 2015, and although the Respondent had sent instructions for an agent to a Suva agent to appear, there had been no

appearance on behalf of the Respondent and thus it was struck out;

(2) Despite there now being no appeal "on foot" in the Court of Appeal, the Respondent wished to proceed with his application before the Commission for a stay.

[10] Justice Madigan refused the Respondent's application for a stay noting that he had resigned as Commissioner and the substantive professional misconduct application would now be heard by the new Commissioner. The matter was then adjourned for mention before the new Commissioner.

(3) Proceedings before new Commissioner – Ruling on nature and validity of charge

[11] Having been appointed as the new Commissioner, I then arranged for a call over of this matter to take place following on 10th February 2016, following my swearing-in on 9th February 2016.

[12] On 10th February 2016, the Respondent appeared on his own behalf advising that his Counsel, Mr. D.S. Naidu, was overseas undergoing medical treatment. I then showed to both the Respondent and Counsel for the Applicant an email dated 2nd November 2015 that the Secretary of the Commission had received from Mr. Naidu wherein he advised: *'Madam Secretary, Just to let you know that I have no further instructions to act for Mr. Nacolawa. I understand he has engaged the services of another Counsel. Kind regards DS Naidu.'* The Respondent felt that the confusion might have arisen because Mr. Naidu had suddenly taken ill. As six months had now passed (focused principally on the recusal argument before the previous Commissioner), I was prepared to deal first with the question as to **the nature and validity of the charge faced by the Respondent**. Accordingly, I had the Respondent confirm his plea of "not guilty" and adjourned the matter until 24th March 2016 to enable each party to clarify their position as to whether the Respondent was facing was an offence of strict or absolute liability (as may have been inferred from Justice Madigan's notes of Mr. Naidu's submission when the matter was first called on 25th September 2015), but clearly had crystalised as an argument at the second mention on 21st October 2015, when **Mr. Naidu made an oral submission that section 11(3)(a) of the *Trust Accounts Act 1996* was in respect of an onus placed upon an auditor**.

[13] On 24th March 2016, Orders were made for each party to file written submissions and the matter was listed for hearing on 21st April 2016 on the issue of whether the offence was one of strict or absolute liability.

[14] On 21st April 2016, the parties spoke to their respective submissions. The Respondent explained, however, he had expected that Mr. D.S. Naidu would be appearing as his Counsel that day to argue the matter and he had only been made aware the day or so before that Mr. Naidu was not available. The Respondent sought an adjournment to get further advice as to whether there were further arguments that needed to be considered and/or whether there should be a change in his plea. The matter was adjourned until 6th June 2016 with certain Orders made for the Respondent to advise the Commission and the Applicant within seven days as to whether he was maintaining or withdrawing his plea of not guilty.

[15] On 28th April 2016, the Respondent advised the Commission in writing (with a copy to the Applicant) that he was maintaining his plea of not guilty.

[16] On 6th June 2016, the parties appeared before me. The Respondent confirmed his plea and that he had no further submissions to make on this issue. Counsel for the Applicant confirmed that he also had no further submissions to make. The parties were advised that judgment would be on notice.

3. The legislation

[17] Section 11 of the *Trust Accounts Act 1996* (as amended by the *Trust Accounts (Amendment) Decree 2009*) states:

> *'Auditor - appointment, qualifications, and cessation of appointment*
>
> ***11. - (1) A trustee shall appoint a person or firm as auditor to audit the trust accounts**, accounting and other records **required to be kept by the trustee pursuant to this Act**.*
>
> *(2) A trustee shall notify the Registrar of the full name and business address of the auditor so appointed within one month after the later of the date of commencement of this Act, and the date upon which the trustee becomes a trustee. Notification of appointment shall be accompanied by written evidence of the author's acceptance of the appointment.*

*(3) **A person shall not accept appointment as nor act as auditor** under this Act **unless that person** -*

*(a) **is the current holder of a Certificate of Public Practice** issued by the Fiji Institute of Accountants (this provision shall not apply to a person or class of persons approved by the Minister); and*

(b) is not indebted in an amount exceeding one thousand dollars to the trustee or firm of which the trustee is a partner except for fees and expenses for professional services rendered by the trustee or such firm; and

(c) is not a partner or employee of the trustee or any employee of the trustee.

*(4) **Where a firm is appointed or intended to be appointed as auditor**, that firm **shall not accept appointment or so act unless every member of that firm satisfies the qualifications in the preceding subsection**.*

(5) The appointment of a firm as auditor by a trustee shall be deemed to an appointment of all persons who are members of that firm at the date of appointment.

(6) Where a firm has been appointed as auditor by a trustee an[d] the membership of the firm changes, the firm as newly constituted shall, provided it is not disqualified from acting as auditor, be deemed to be appointed as auditor by the trustee and that appointment shall betaken to be an appointment of all persons who are members of the firm, and no fresh notice of appointment shall be required.

(7) A report or notice that purports to be made or given by an auditor appointed by a trustee shall not be duly made or given unless signed by the auditor, the auditor is a firm is signed by a member of the firm in the firm name and his or her own name.

(8) Whenever an auditor appointed by a trustee ceases to act as such for any reason, the auditor and the trustee shall forthwith give notice to the Minister and the Registrar. The auditor may provide to the Minister or the Registrar a report setting out the circumstances of that cessation.'
[My emphasis]

[18] The Respondent has been charged under section 82(1)(a) of the *Legal Practitioner's Decree 2009* which states:

'Professional Misconduct

82.—(1) For the purposes of this Decree, 'professional misconduct' includes –

(a) unsatisfactory professional conduct of a legal practitioner,

a law firm or an employee or agent of a legal practitioner or law firm, ***if the conduct involves a substantial or consistent failure*** *to reach or maintain a reasonable standard of competence and diligence'.* [My emphasis]

[19] In short, the argument is that the Respondent has been charged under section 82(1)(a) due to his consistent failure to check if the auditor that he had appointed to prepare the audit report of the Respondent's trust account was properly qualified, that is, that the auditor was a 'current holder of a Certificate of Public Practice' as required of the auditor by section 11(3) of the *Trust Account Act 1996*.

[20] Further, Rule 7.2 of the 'Rules of Professional Conduct and Practice' (attached as a Schedule to the *Legal Practitioner's Decree 2009*) states:

'*CHAPTER 7—CONDUCT OF PRACTICE*

...

7.2 ***A practitioner shall comply with*** *the provisions of the Decree,* ***and any legislation dealing with the regulation of trust accounts****.'*

[My emphasis]

[21] Also, section 28 of the *Trust Accounts Act 1996* states:

'Offences and penalties

28. *- (1)* ***A person who-***

(a) ***contravenes or fails to comply with any provision of this Act*** *is guilty of an offence against this Act and* ***is liable on conviction to a penalty of $3,000****; or*

(b) with intent to defraud contravenes or fails to comply with any provision of this Act is guilty of an offence against this Act and is liable on conviction to a penalty of $10,000 or to imprisonment for 3 years.

(2) Any person who is convicted of an offence against this Act shall be guilty of a further offence against this Act if the offence continues after the person is convicted and liable to an additional penalty of $500.00 for each day during which the offence so continues.'

[My emphasis]

4. The submissions

(1) The Applicant's submissions

[22] The Applicant's submissions, in summary, (as I understood them) are as follows:

(1) The charge against the Respondent is not that he has breached section 11(3)(a) of the *Trust Accounts Act 1996* because that section puts the onus on an auditor not to accept an appointment and not on the legal practitioner. Rather, the Applicant has brought a charge under section 82(1)(a) of the *Legal Practitioners Decree 2009* to say that there was a lack of or failure on the part of the Respondent to undertake due diligence, that is, to make an enquiry about the auditor.

(2) If the legislation is putting a burden on the auditor not to accept an appointment, similarly a legal practitioner who is the trustee of a trust account also has to take precautions in ensuring that the person who is auditing the trust account is a qualified person as per the statutory requirement of section 11(3)(a) of the *Trust Accounts Act 1996*.

(3) Even though the *Trust Accounts Act* is silent and does not go on to say that the legal practitioner should also make enquires the same as section 11(3)(a) which places a burden upon the auditor who is appointed, it is the legal practitioner's trust account such that the onus that is on the auditor pursuant to section 11(3)(a) follows through to the legal practitioner.

(4) The Respondent was previously reprimanded and fined for a similar offence in relation to his trust account three years ago so he was well aware of the requirement. The fact that he has done it again shows that it is a consistent failure on his part when he should have been more vigilant to make proper enquires and check if the auditor was properly qualified to prepare his audit report.

(5) Rule 7.2 of the 'Rules of Professional Conduct and Practice' 7.2 states that *'a practitioner shall comply with the provisions of the Decree and any legislation dealing with the regulation of trust accounts'*. Section 11(1)(a) of the *Trust Accounts Act* makes it compulsory for a trustee to *'appoint a person or firm as auditor to audit the trust accounts'*. Section 11(3)(a) then says that the auditor that is appointed should not accept appointment if he or she is not a CPP

holder. Because the term that is used in section 11(1) is that *'a trustee **shall** appoint an auditor'* it is an absolute liability offence not to do so. Section 11(1) should be read in conjunction with section 11(3)(a) because if the intention of the legislator is to allow the practitioner to appoint any auditor irrespective whether the auditor is a CPP holder or not, then why would the legislation then place a burden or onus on the auditor to only accept appointment or act as an auditor when he or she is a CPP holder because then there would be a conflict between 11(1) and 11(3)(a)?

(6) The main argument of the Applicant, therefore, is that the trustee cannot rely on the auditor that the auditor is a CPP holder just because section 11(3) puts a burden on the auditor as such. It is why section 11(1) states that the *'trustee shall appoint'* an auditor. So it is compulsory for a trustee to appoint an auditor and then it is incumbent upon the trustee to make sure that the auditor complies with section 11(3)(a) (that the auditor is a current holder of a CCP) and section 11(4) (the firm of auditors shall not accept appointment unless every member of that firm satisfies the qualifications in section 11(3)(a), that is, every member holds a CCP).

(7) The Fiji Institute of Accountants have a website which they update constantly and it is *"just a click away"* for any practitioner to verify that an auditor is a CPP holder.

[23] Despite section 11(8) requiring that '*Whenever an auditor appointed by a trustee ceases to act as such for any reason, the auditor and the trustee shall forthwith give notice to the Minister and the Registrar'*, according to Counsel for the Applicant, there is no central list kept by the Chief Registrar's office as to who are the qualified people to undertake such auditing work. There is just a list kept for each practice as to who is auditing each practice.

[24] Further, if I understood Counsel for the Applicant correctly, if and when a firm changes their auditor who is to audit the firm's trust accounts, the onus is on both the auditor, as well as upon the trustee/firm (pursuant to section 11(8)), to notify the Registrar *"but that process is not happening in practical sense"*. Unsurprisingly, Counsel for the Applicant conceded at the hearing on 21st April 2016, that *"... perhaps a practice direction needs to be sent"*, whilst adding, *"But again My Lord, on that note, we would submit that practitioners should be mindful of these provisions ..."*

[25] According to Counsel for the Applicant, despite the amendment to section 11(8) of the *Trust Accounts Act* coming into force as from the 30th June 2009, requiring both the auditor and trustee to give notice to both the Minister and the Registrar of the High Court (the latter in substitution for the Fiji law Society), there has been no formal notification to the legal profession from the Registrar's office to this effect.

(2) The Respondent's submissions

[26] The Respondent's submissions, in summary, (as I understood them) are as follows:

(1) In relation to the previous offence that was also heard before Justice Madigan in 2014, the accountant who signed that audit was not even a registered accountant. He worked under an accountant who was licensed with the Fiji Institute of Accountants. According to the Respondent, "*There was nothing highlighted"*, or no argument, *"in regards to that a lawyer's trust account must be audited by a CPP holder"*. The person who had "signed off" on the accounts was not the principal of the firm. Rather, he was an employee who did not hold a certification with the FIA. The principal who held the license has died and the employee *"did not inform me what he did by signing".* The Respondent alleges *"before I pleaded guilty I informed his Lordship, I said two or three times 'sir I would like to seek legal advice' and he just said 'are you guilty or not guilty' after [he] repeated to me then I said "yes sir I plead guilty"'*.

(2) The Applicant's argument is misconceived for the following reasons:

(a) Section 11(3)(a) of the *Trust Accounts Act 1996* (that a person shall not accept appointment as an auditor unless they are the current holder of a CPP) is not an *"offence creating section"* for anyone, least for all a legal practitioner;

(b) The section does not exclude audited reports by non-certified auditors;

(c) The section does not have default provisions impacting on practitioners who submit reports by non-certified auditors.

(4) The present charge against the Respondent is bad in law as no provision of section 11(3)(a) (that a person shall not accept appointment as an auditor unless they are the current holder of a CPP) can be imported into section 82(1)(a) of the *Legal Practitioners Decree 2009*.

(5) Section 28(1) of the *Trust Accounts Act 1996* creates its own offences and penalties. Thus, a jurisdictional question arises as to whether a breach under the said Act can be prosecuted under the *Legal Practitioners Decree 2009?*

(6) The alleged breach of section 11(3)(a) does not come within section 82(1)(a) of the *Legal Practitioners Decree 2009* because a reading of section 82(1)(a) says '*a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence'*.

5. Interpreting the legislation

(1) An "inference" interpretation

[27] On 11th March 2014, Justice Madigan, delivered a judgment in relation to a previous charge of 'unsatisfactory professional conduct' against the Respondent in relation to a previous trust account audit. On that occasion, the Respondent had been charged as follows:

Count 1

Professional Misconduct: Contrary to Section 83(1)(a) of the *Legal Practitioners Decree 2009*.

PARTICULARS

Mr. Saimoni Nacolawa, a legal practitioner, being the principal of the law firm Nacolawa & Co, **while presenting his Trust Account audit report** to the Office of the Attorney General and the Chief Registrar, **without making proper enquiry about Glory Finance, Business & Management Consultant,** dishonestly engaged the services of the said accounting firm to prepare his Trust Account audit report **when said** accounting **firm was not a member of the Fiji Institute of Accountants nor holds a certificate to offer accounting services** to the public, which conduct was an act of professional misconduct.

[28] Whilst there may be some argument as to the drafting of the above particulars, that is, there are no dates and whether 'without making proper enquiry' can be said to be conduct that falls within the allegation that the practitioner 'dishonestly engaged the services', I note the Respondent entered a plea of guilty. Indeed, upon reading the previous Commissioner's notes on that file, it is clear that the Respondent initially raised the issue that *"I need a second opinion"*. He also raised a defence arguing that the person who audited the Respondent's trust account worked for a principal accountant who had died, however, the Respondent had never been informed that such was the case.

Despite raising these issues, the Commissioner's notes state: *'Admit the charge. Want time to mitigate.'*

[29] It is clear from my reading of the submissions in mitigation dated 21st February 2014 (that are on the Commission's file in relation to that previous matter), that the Respondent was raising a defence (and arguably traversing his plea), when he submitted that 'at all times' he believed the person who audited the firm's trust account was doing so as an accountant and noted the statement in the audit report:

> *'we have audited the accounts of Nacolawa & Co Trust account for the period from 1st March 2012 to 31st October 2013 in accordance with the Fiji institute of Accountants Standards on Auditing and Audit Guidance Statements ...'* [My emphasis]

[30] Indeed, the fact that the audit report highlighted some problematic issues with how the Respondent had maintained his trust account, arguably, on one view, would have reinforced the perception that the aduit had been undertaken in accordance with the Fiji Institute of Accountants Standards.

[31] Despite the above, the Respondent, at paragraph [4] of his written submissions in that previous matter clearly stated that he 'has pleaded guilty'.

[32] On 24th February 2014, the parties appeared before Justice Madigan. The Respondent relied upon his written submissions. Counsel for the Applicant made oral submissions. These were summarised by Justice Madigan (at paragraph [7]) in his judgment handed down on 11th March 2014, as follows:

> *'Counsel for the Registrar submits that every practitioner must exercise due diligence in ensuring that their auditors are registered as professional accountants; and that laxity with their trust account matters could lead to severe harm to the general public. Furthermore, she submits, the audit report is the ultimate responsibility of the practitioner/trustee.'*

[33] Justice Madigan then set out at paragraphs [8] to [12] of his judgment his views as to the law:

> *'8. I agree with counsel to the Registrar that every practitioner be*

he/she a sole practitioner or a partner in large practice has the responsibility and statutory duty to be congnizant of the Trust Account Rules as they pertain to legal practitioners. By the terms of section 3 of the Trust Account Act 1996 (as amended by the Trust Accounts (Amendment)(No 2) Decree 2009), every practitioner whether solely or in partnership must establish and keep a trust account.

9. *By the terms of clause 7.2 of the Rules of Professional Conduct and Practice (as scheduled in the Decree) a practitioner shall comply with the provisions of the Decree, and any legislation dealing with the regulation of trust accounts. Section 11(1) of the Trust Accounts Act 1996 makes it compulsory for a trustee to appoint a person or firm as auditor to audit the trust accounts. It is a statutory requirement (by section 11(3)(a) of the Act) that the person appointed be the current holder of a practicing certificate issued by the Accountant's Institute.*

10. *It is not in dispute that neither George Prince [the auditor] nor the entity Glory Finance [the firm] were so certified and the practitioner then is in breach of the statutory requirements, and the complaint by the Chief Registrar is therefore* ***established****.*

11. *… There is no evidence that the practitioner had taken steps with his trust account that would prejudice his clients; his default applies to the audit of his accounts. He prays in mitigation that he was totally unaware of the incapacity of his auditor who was holding himself out to be a duly certified accounting practitioner. While this failure on the part of the auditor may well be a disciplinary matter for the Institute of Accountants, it is nevertheless incumbent on a legal practitioner to ensure that his auditor(s) are properly certified. The requirement of the Registrar and the Minister for Justice to see properly audited accounts of practitioners is an important requirement that allows proper supervision and regulation of a practitioner's practice and would those accounts be audited by uncertified persons then the accounts could be abused and defeat the legislative purpose of the Act.*

12. *… the failure on his part is but a procedural failure which of course could have the potential to allow abuse of his accounts. Practitioners should note that it is incumbent of each of them to ensure that those professionals that they instruct to comply with legislative requirements are properly certified to so act and this must apply particularly to those dealing with the most important function of certifying and auditing their trust accounts.'*

(2) An alternative interpretation

[34] I agree with Madigan J that it is clear that section 11(1) of the *Trust Accounts Act 1996* makes it compulsory for a trustee to appoint a person or firm as

auditor to audit the trust accounts. I disagree, however, with Madigan J's further statement that 'It is a statutory requirement (by section 11(3)(a) of the Act) that the person **appointed** be the current holder of a practicing certificate issued by the Accountant's Institute' with the inference being that this an onus upon the trustee. In my view, **the legislation clearly states that the onus is on the auditor**, with the words: '(3) **A person shall not *accept* appointment as nor *act* as auditor** under this Act unless that person - *(a)* is the current holder of a Certificate of Public Practice issued by the Fiji Institute of Accountants'. [My emphasis] **The wording of the section does not say that 'a trustee shall not appoint** a person nor allow a person to act as auditor under this Act **unless that person - *(a)* is the current holder of a Certificate of Public Practice issued by the Fiji Institute of Accountants**'.

[35] In my view, **the wording of the legislation does not cast an onus upon the third party who has permitted the infringement to take place** such as was the legislative requirement in the famous Australian case of ***Proudman v Dayman*** (1941) 67 CLR 536. In their respective judgments, the justices of the High Court found that Ms Proudman permitted a Mr. Hawke to drive a car when he was not the holder of a driver's licence. She was charged pursuant to s.30 of the *Road Traffic Act 1934-1939* (South Australia), 'Duty to obtain driver's licence' which stated:

> *'**Any person who**, unless exempted by the regulations, drives a motor vehicle on any road without being the holder of a licence for the time being in force, or employs **or permits** **any person not being the holder of such a licence to drive a motor vehicle on any road shall be guilty of an offence**.'* [My emphasis]

According to Rich ACJ (at pp.538-539):

> 'If she did not know **she did not inquire, and a fair inference is that she did not care** … It is simply a case where a person **showing complete indifference** to **the fulfilment of the duty laid on her by the legislature** says: "I didn't know."' [My emphasis]

And as McTiernan J concluded (at p.543):

> 'In my opinion the defendant was rightly convicted because upon the true construction of the section her guilt did NOT **depend on the question whether she knew or believed on reasonable grounds** that the driver was not the holder of a licence. **She was guilty because it was proved that he was not the holder of a licence and that she did permit him to drive the car on a road**.

> The *mens rea* justifying the conviction consisted of the **intent to do an act which is prohibited** by s. 30, that is, **to give permission** to a person who was not the holder of a licence to drive the car on the road.' [My emphasis]

[36] Returning to the present case, **there is also the question of how could a legal practitioner be prosecuted under section 28(1)(a) of the *Trust Accounts Act 1996* for a breach by an auditor of section 11(3)(a)**, that is for the auditor failing to be a current holder of a Certificate of Public Practice issued by the Fiji Institute of Accountants? Section 28(1)(a) states that '**A person who** *(a)* **contravenes or fails to comply with any provision of this Act** … **is liable on conviction to a penalty of $3,000'.** Surely, the person who contravenes or fails to comply with section 11(3)(a) must be the auditor for failing to be a current holder of a Certificate of Public Practice issued by the Fiji Institute of Accountants, as section 11(3)(a) clearly states that the onus to hold such a Certificate is upon the auditor who ACCEPTED appointment or ACTED as auditor? There is no mention of any onus upon the trustee (that is, the legal practitioner). Thus, the person who would be so prosecuted for a breach of section 11(3)(a) would not be the legal practitioner but the person who accepted appointment or acted as auditor when they were not the current holder of a Certificate of Public Practice issued by the Fiji Institute of Accountants. **Further, there has been no evidence placed before the Commission where a legal practitioner has ever been successfully prosecuted pursuant to section 28(1)(a) for a breach of section 11(3)(a).**

[37] There is also the question of Rule 7.2 of the Rules of Professional Conduct and Practice requiring that 'a practitioner shall comply with the provisions of the Decree, and any legislation dealing with the regulation of trust accounts.' According to the interpretation of the legislation by Madigan J, a practitioner shall comply with section 11(3)(a) even though the section states that onus is on the auditor.

(3) A purposive or literal approach and the golden rule

[38] This is not the usual type of legislation dealing with strict or absolute liability offences such as discussed by the High Court of Australia in ***Proudman v Dayman*** or in Fji such as by Winter J in ***State v Hong Kuo Hui*** (Unreported,

High Court of Fiji, HAC40 of 2004) (Paclii: [2005] FJHC 732, 2 May 2005, <http://www.paclii.org/fj/cases/FJHC/2005/732.html>). Instead, this is a case where it is said by Counsel for the Applicant that the legislation has imposed absolute liability upon a person that they 'shall not' accept an appointment or act as an auditor without holding the necessary certificate from the Fiji Institute of Accountants and, if I have understood the Applicant's argument correctly, it is to be **inferred** that such liability is also to be imposed on a third party trustee, that is, the legal practitioner. **There has, however, been no legal basis placed before the Commission by way of case law concerning statutory interpretation to support such a conclusion.**

[39] It could be said that the Applicant is arguing a **purposive** rather than a **literal** approach to statutory interpretation. That is, the Commission should be considering the legislative policy of the *Trust Accounts Act 1996*. In that regard, I note the approach in Fiji was discussed by me at length in ***Auditor General v Reserve Bank of Fiji*** (Unreported, High Court of Fiji, Case No. HBC42 of 2008, 8 August 2008) (Paclii: [2008] FJHC 194, <http://www.paclii.org/fj/cases/FJHC/2008/194.html>), (a case that I had to consider when I had been sitting previously as a Judge of the High Court of Fiji) wherein I explained at [17]:

> *'... As Counsel for the Defendant noted in oral submissions, in relation to the interpretation of modern statutes, it is entirely appropriate these days for Courts to look at the observations made at the time of the party moving Bill ... as the House of lords affirmed in* ***Pepper (Inspector of Taxes) v Hart*** *[1993] 1 AC 593 ...'*

[40] Indeed, as I observed in *Auditor General v Reserve Bank of Fiji*, the reasoning in ***Pepper*** was applied in Fiji by a majority judgment of the Court of Appeal in ***Bull v Commissioner of Inland Revenue*** (Unreported, Court of Appeal of Fiji, Civil Action Nos. ABU0017 of 1997S and ABU0018 of 1997S, 15 May 1998, Tikaram P and Thompson JA) (Paclii: <http://www.paclii.org/fj/cases/FJCA/1998/21.html>). That view was confirmed by a majority judgment of the Supreme Court of Fiji in ***Bull v Commissioner of Inland Revenue (Majority Judgment)*** (Unreported, Supreme Court of Fiji, Civil Action Nos. CBV0005 and CBV0006 of 1998S, 10 March 1999, Lord Cooke of Thorndon and Sir Anthony Mason JSC) (Paclii: [1999]

FJSC 5, <http://www.paclii.org/fj/cases/FJSC/1999/5.html>), wherein they said at pages 6-7:

> *'Use of History*
>
> *There was a submission made during the course of argument that the Court should not have regard to extrinsic materials. It is, of course, right to say that the courts resort to extrinsic materials in order to interpret statutes only in cases of ambiguity (Re Bolton; Ex parte Beane [1987] HCA 12; (1987) 162 CLR 514). If the text is clear, the text must prevail. If, however, the text is ambiguous or admits of more than possible interpretation ... it is now widely accepted in many common law jurisdictions that recourse by the courts to legislative history and extrinsic materials is a legitimate aid to interpretation. For present purposes it is sufficient to refer to the decision of the House of Lords in Pepper v. Hart [1993] AC 593 where the rule excluding reference to Parliamentary materials as an aid to statutory construction was relaxed so as to permit such reference when-*
>
> *(1) the legislation is ambiguous or obscure or leads to absurdity,*
>
> *(2) the material relied upon consists of statements by a Minister or other promoter of a Bill together with such other Parliamentary material as is necessary to understand such statements, and*
>
> *(3) the statements are clear. In our view, the extrinsic materials to which reference can be made as an aid to statutory construction are not limited to Parliamentary materials. In the past, at least for the purpose of identifying the "mischief" sought to be remedied by legislation, resort has been made to the reports of committees of experts or other persons on which legislation has been based. We see no reason why reports of that kind cannot be used as an aid to statutory construction, without being confined in their use to the identification of the mischief aimed at. Indeed, we consider that it would be unwise to limit the extrinsic materials to which a court can legitimately have regard, so long as the pre-conditions of ambiguity and clarity are observed and the materials are of such a kind that they do throw significant light on the statutory intention."*
> [My emphasis]

[41] In 2014, 15 years after the decision in ***Bull***, the Supreme Court of Fiji was again asked to consider whether to apply the literal or purposive view to the interpretation of a statute in ***Suva City Council v R B Patel Group* Ltd** (Unreported, Supreme Court of Fiji, Supreme Court Appeal: CBV0006 of 2012, 17 April 2014, Marsoof, Hettige and Wati JJSC) (Paclii: [2014] FJSC 7, <http://www.paclii.org/fj/cases/FJSC/2014/7.html>).

[42] The case had been heard initially in the High Court (see ***RB Patel Group Ltd v Suva City Council***, High Court of Fiji, Case No: HBC180 of 2010, 28 September 2011) (Paclii: [2011] FJHC 606, <http://www.paclii.org/fj/cases/FJHC/2011/606.html>), where Hettiarachchi J said at [39]:

> *'In interpreting a statute Court cannot go beyond the words used in the statute itself and when the meaning of the statute on the face of it is plain and obvious I do not think that it is necessary to apply the normal canons of statutory interpretations.'*

[43] On appeal, Chandra JA (with whom Calanchini AP and Mutunayagam JA agreed) said in the Fiji Court of Appeal at [20] and [34]-[35]:

> *'20. The learned Judge has interpreted the relevant statutory provisions cited above referring to several decisions relating to interpretation of statutes and adopted the literal interpretation on the basis that the words are plain and clear and unambiguous.*
> *...*
> *34. ... It is an accepted principle of law that such by-laws should be certain and be reasonable.*
> *35. ... However in the operation of them a certain amount of certainly [sic] should attach to them.* ***If vague or wide terms are used, it should be possible to circumscribe their limits****. It is my view that though the by laws relating to designated businesses have been properly laid down, in their operation they should be certain and be able to lay down their scope.'* [My emphasis]
>
> (See ***RB Patel Group Ltd v Suva City Council***, Case No. ABU0056 of 2010, 29 September 2012) (Paclii: [2012] FJCA 56, <http://www.paclii.org/fj/cases/FJCA/2012/56.html>).

[44] Even though the appeal by Suva City Council to the Supreme Court ultimately concerned the interpretation of a statute and delegated legislation, the majority in the Supreme Court in *Suva City Council v R B Patel Group Ltd,* emphasised the "golden rule" of statutory interpretation, as Marsoof JSC explained (with whom Hettige JSC agreed) at [62]-[64]:

> *'62. Generally speaking, there are two schools of thought in relation to the interpretation of statutes, the literal and the purposive. The literal approach, which was defined and explained by Higgins J. in Amalgamated Society of Engineers v Adelaide Steamship Co Ltd [1920] HCA 54; (1920) 28 CLR 129, 161-2, seeks the intention of the legislature*

through an examination of the language in its "ordinary and natural sense ... even if we think the result to be inconvenient or impolitic or improbable". This method was also preferred by McHugh J. in Hepples v FCT [1992] HCA 3; (1991-1992) 173 CLR 492, 535-6, even if it produces "anomalies or inconveniences". Courts have stressed that they "cannot depart from the literal meaning of words merely because the result may ... seem unjust" (CPH Property Pty Ltd & Ors v FC of T 98 ATC 4983, 4996 per Hill J.) or even "lead to a manifest absurdity" (R v The Judge of the City of London Court [1892] 1 QB 273, 290 per Lord Esher).

63.An alternative method of interpretation applied by the courts is known as the purposive approach, which is an approach to statutory interpretation in which the courts interpret legislation in the light of the purpose for which it was enacted and which promotes the purpose of the legislation. This approach recognizes that "statutory interpretation cannot be founded on the wording of the legislation alone"(per Lacobucci J in Re Rizzio & Rizzo Shoes Ltd., [1998] 1 S.C.R. 27, at paragraph 21) and permits courts to utilize extraneous pre-enactment material such as cabinet memoranda, draft bills, Parliamentary debates, committee reports and white papers. The purposive approach was explained by Kirby J in FC of T v Ryan, (2000) 42 ATR 694, 715-716, in the following manner:-

> *"In this last decade, there have been numerous cases in which members of this court ... have insisted that the proper approach to the construction of federal legislation is that which advances and does not frustrate or defeat the ascertained purpose of the legislature ... even to the point of reading words into the legislation in proper cases, to carry into effect an apparent legislative purpose ...This court should not return to the dark days of literalism."*

64.*Somewhere between the strictly literal method of interpretation and the purposive approach to interpretation lies the "golden rule", which was clarified by Viscount Simon LC in his judgment in Nokes v. Doncaster Amalgamated Collieries Ltd. [1940] 3 All ER 549 at 553 as follows:-*

> *"The golden rule is that the words of a statute must prima facie be given their ordinary meaning. We must not shrink from an interpretation that which will reverse the previous law, for the purpose of a large number of our statute law is to make lawful that would not be lawful without the statute, or conversely, to prohibit results which would otherwise follow.... At the same time, if the choice is between two interpretations the narrower of which would fail to achieve the manifest purpose of legislation, we should avoid a construction that would reduce the legislation to futility, and should rather accept the bolder construction, based on the view that Parliament would legislate only for the purpose of bringing about an effective result."'*

[45] By contrast, Wati JSC in dissent in *Suva City Council v R B Patel Group Ltd* also cited at [99] much of the same passage by Viscount Simon LC in *Nokes v. Doncaster Amalgamated Collieries Ltd* as follows:

'99. To determine whether the petitioner needs to pay separate business licence ee for the different business activities described above, the answer is found in s.4 of the BLA. The section is plain, clear and unambiguous in its direction and interpretation. The Court of Appeal ought not to have delved into the definition of ***"supermarket"*** *to find the answer. There was no need to apply the canons of statutory interpretation. It is not the duty of judges to apply their opinions of sound policy so as to modify the plain meaning of the statutory words. I have no temptation, in a matter of this kind, to speculate or read into the statute anything which is not there, but I cannot find that s. 4 is either incomplete or ambiguous.*

> *"...The principles of construction which apply in interpreting such a section are well established. The difficulty is to adapt well-established principles to a particular case of difficulty. The golden rule is that the words of a statute must prima facie be given their ordinary meaning. We must not shrink from an interpretation which will reverse the previous law, for the purpose of a large part of our statute law is to make lawful that which would not be lawful without the statute, or conversely, to prohibit results which would otherwise follow. Judges are not called upon to apply their opinions of sound policy so as to modify the plain meaning of statutory words."*

Underlining is Mine

Per Viscount Simon, L.C. in Nokes v. Doncaster Amalgamated Collieries Ltd. [1940] 3 All ER 549 at 553.'

(4) Applying the golden rule to section 11(3)(a) of the Trust Accounts Act 1996

[46] In applying '*the golden rule'* of statutory interpretation favoured by all three justices in the Supreme Court in *Suva City Council v R B Patel Group Ltd*, that is, *'that the words of a statute must prima facie be given their ordinary meaning',* I cannot '*accept the bolder construction'* favoured by Madigan J in his interpretation of section 11(3)(a) of the *Trust Accounts Act 1996.* In addition, I note that **there has been no material placed before the Commission by the Applicant as to '*the manifest purpose of legislation'* to support such a conclusion noting that the wording of section 11(3)(a) of the *Trust Accounts Act 1996* is in respect of an onus placed upon an auditor not a trustee.** Also, there is the question of section 28. How could a legal practitioner be prosecuted under section 28(1)(a) for a breach of section 11(3)(a) in its present form? **Therefore, I am of the view that these proceedings must fail and the charge be struck out.**

(5) Referral to the Attorney-General

[47] I am arranging for a copy of this judgment to be provided to the Attorney-General. If it was intended, pursuant to section 11(1) of the *Trust Accounts Act 1996,* to place an onus on a trustee 'to appoint a person or firm as auditor', who also, pursuant to section 11(3)(a), 'is the current holder of a Certificate of Public Practice issued by the Fiji Institute of Accountants', then consideration may need to be given for legislative amendment to section 11(1) and/or section 11(3)(a) of the *Trust Accounts Act 1996*.

ORDER

[48] The formal Order of the Commission is:

1. The Application filed before the Commission in Case No. 004 of 2015, *Chief Registrar v Saimoni Nacolawa,* is struck out.

Dated this 21st day of September 2016.

Dr. Thomas V. Hickie
COMMISSIONER